IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD M. COHEN	:	CIVIL ACTION
	:	
v.	:	
	:	
LIBERTY LIFE ASSURANCE CO.	:	NO. 99-2007

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

HUTTON, J. August 27, 2002

Having considered all of the testimony and exhibits offered at the April 15, 2002 Hearing, I now, pursuant to Federal Rule of Civil Procedure 52(a), make the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiff Howard M. Cohen ("Plaintiff") was employed by Curtis 100, a subsidiary of American Business Products, Inc. ("ABP"), located at 100 Riveredge Parkway, Suite 1100, Atlanta, Georgia. (Claims file p. 225).

2. Defendant Liberty Life Assurance Company of Boston ("Defendant") issued to ABP a Disability Income Policy ("Policy"). It was issued in connection with Plan Number 50-274598. (See Certificate of Coverage, marked as “Exhibit E.”)

3. Defendant both funds and administers the benefits available under the Policy.

4. The Policy written pursuant to the Plan provides the following definition of disability:

> i)... "Disability" or "Disabled" means during the Elimination Period and the next 24 months of Disability the Covered Person is unable to perform all of the material and substantial duties of his occupation on an Active Employment basis because of an Injury or Sickness; and
>
> ii) After 24 months of benefits have been paid, the Covered Person is unable to perform, with reasonable continuity, all of the material and substantial duties of his own or any other occupation for which he is or becomes reasonably fitted by training, education, experience, age and physical and mental capacity.

(See Policy No. 50-274598, sec. 2, marked as "Exhibit E.")

5. In September of 1996, Plaintiff applied for and received Disability benefits. These benefits covered a 24-month period and were monthly benefits in the amount of $3,893.40. (Claims file, p. 198).

6. During the spring of 1997, Defendant hired International Claims Specialists (ICS) to conduct an interview with Plaintiff. (Claims file, p. 175).

7. Lisa Brown, an employee of ICS, went to Plaintiff's home at 4:00 PM on Wednesday, April 30, 1997 to conduct this interview. The door was answered by a babysitter who stated that Plaintiff was "out walking the baby." (Claims file, p. 175).

8. On this same day, Lisa Brown spoke to unidentified neighborhood boys who stated that Plaintiff plays basketball with them and that he also "plays catch." (Claims file, p. 172).

9. On May 8, 1997, at approximately 12:30 PM, a second unannounced visit to Plaintiff's home was attempted. No one was found at the Plaintiff's residence. (Claims file, p. 167).

10. A call-back card was left at Plaintiff's home on May 8, 1997, and Plaintiff called Ms. Brown on May 9, 1997. Plaintiff advised Ms. Brown that he was unavailable on May 9, 1997 because he was going to the seashore for the weekend. An appointment to obtain a signed statement from Plaintiff was scheduled for May 12, 1997 at 9:30 AM. (Claims file, p. 167-168).

11. On May 12, 1997, a signed statement was obtained from Plaintiff, where he described the nature of his back injuries and stated, inter alia, that he could not stand or sit for long periods of time and that driving was also painful. (Claims file, p. 161-165).

12. Subsequent to the ICS interview, which occurred during the two-year period when Plaintiff was still receiving disability benefits, Defendant ordered that video surveillance should be

conducted on Plaintiff. Defendant hired ICS to conduct the surveillance, which occurred on Saturday, July 5, 1997, and Sunday, July 6, 1997. ICS wrote its report on July 9, 1997, and the case was assigned account number 53348, file number 110630. The surveillance was conducted at Plaintiff's shore home in Margate, New Jersey. (Claims file, p. 148-153).

13. The following observations were noted by ICS during the two-day surveillance period: Plaintiff walked to a street corner while carrying his infant daughter against his chest, occasionally rocking left to right while standing on the corner watching neighborhood activity; Plaintiff intermittently stood in driveway/leaned against his minivan while watering his lawn, then retrieved a lawn chair and sat in it while continuing to water his lawn; Plaintiff placed several bags into the rear cargo section of his minivan; Plaintiff walked his dog; Plaintiff lifted his arms above his head to close the rear hatch of his vehicle; Plaintiff entered his vehicle and drove back to his residence in Cheltenham, Pennsylvania. (Claims file, p. 148-153).

14. On October 27, 1997, Defendant wrote to Dr. Morrison requesting further medical documentation and clarification regarding Plaintiff's restrictions and limitations. (Claims file, p. 146).

15. Dr. Morrison responded by letter dated November 11, 1997, indicating that, based MRI studies and EMG studies, Plaintiff's condition has not improved. (Claims file, p. 144).

16. Defendant then determined that a Functional Capacity Evaluation (FCE) should be performed. The FCE was conducted by William Bryant, an athletic trainer, and Gus Ciardullo, a physical therapist, on May 18, 1998. (Claims file, p. 18).

17. Based on the FCE results, William Bryant found that Plaintiff had sedentary-light work capacity. According to Mr. Bryant, the FCE revealed the following: 1) Plaintiff could carry up to 21 pounds and lift from the floor 16 pounds; 2) Plaintiff could sit and stand for 30 minutes at a time with a two minute break; 3) Plaintiff could walk for 20 minutes and stand for 30 minutes at a time if there is an opportunity for a 2 minute break. (Claims file, p. 18-19).

18. William Bryant and Gus Ciardullo noted that, if Plaintiff returned to work, he would have significant difficulty due to his self-limiting secondary to pain. They recommended, therefore, that Plaintiff be returned to his physician for final return to work recommendations. (Claims file, p. 109).

19. Defendant then suggested that pharmaceutical records be obtained and that further surveillance of Plaintiff be conducted. (Claims file, p. 98). The record of conversation indicated that Dr. Crouch, and employee of Defendant, told Lisa Glidden, Claims

Analyst, that surveillance should be conducted and they "[s]pecifically need footage of him driving/sitting comfortably for more than 30 minutes." (Claims file, p. 98).

20. Dr. Crouch stated that surveillance was ordered because there was no objective test for pain and Defendant needed to assess how Plaintiff's alleged pain effected his daily living habits. (Testimony of Dr. Crouch, p. 39).

21. On June 18, 19 and 20, 1998, surveillance of Plaintiff was conducted by MJM Investigations, Inc. at Plaintiff's beach house in Margate, New Jersey. The following activity by Plaintiff was noted during this surveillance: Plaintiff was seen getting off of a bicycle and removed an item from it; Plaintiff was viewed sitting on a lawn chair in the driveway and on his enclosed porch; Plaintiff was viewed pushing a stroller with his daughter in it and heading toward the boardwalk; and Plaintiff was viewed eating with his family at a local restaurant. (Claims file, p. 80-84).

22. Further surveillance took place on July 17, 1998 at Plaintiff's residence in Cheltenham, Pennsylvania. Plaintiff was observed sitting in a lawn chair for a short period, and then walking his daughter in a stroller for approximately one-half mile. (Claims file, p. 70-72).

23. Additional surveillance was conducted on July 29, 1998. The only activity observed was Plaintiff sitting on a step and waiting with his son for a school bus. After the bus picked up the

Plaintiff's son, Plaintiff walked back into his residence placing his right hand, then his left hand, on his back. (Claims file, p. 60).

24. Dr. Morrison had no reaction after viewing the video surveillance tapes. Dr. Morrison stated that an IME was conducted and that it agreed with his findings that Plaintiff was completely disabled. (Claims file, p. 25).

25. On or about October 7, 1998, Plaintiff applied for Long-Term Disability benefits from Defendant. Defendant denied Plaintiff's request for Long-Term Disability benefits on October 20, 1998. (Claims file, p. 18).

26. Defendant denied Plaintiff's request for Long-Term Disability benefits because the Defendant claimed that Plaintiff had the ability to perform occupations outside his previous position. Specifically, the Defendant claimed that it's denial was based on the results of a Functional Capacity Evaluation (FCE) conducted by William Bryant, an athletic trainer, and Gus Ciardullo, a physical therapist, on May 18, 1998. Lisa Glidden, employee of Defendant, stated in her denial letter that Plaintiff could perform the duties of other occupations and, therefore, was not entitled to receive disability benefits beyond the initial 24 month period. (Claims file, p. 18-19).

27. On December 9, 1998, Plaintiff's counsel notified Defendant of his request for reconsideration of Defendant's

decision to deny Plaintiff disability benefits. (Claims file, p. 2).

28. The appeal was considered by Chuck Johnson, an appeals review consultant employed by Defendant. By letter dated February 10, 1999, Defendant denied Plaintiff's request for reconsideration. The denial was allegedly based on the results of the Functional Capacity Evaluation (FCE) conducted by William Bryant, the medical information submitted, a vocational review, and the video surveillance tapes (Claims file, p. 12, 16).

29. During Defendant's determination period, Plaintiff supplied Defendant with numerous pieces of evidence.

30. Medical records submitted by Plaintiff's physician, Dr. Bruce Morrison, indicated the following: muscle strength loss in the lower extremedies with absent deep tendon reflexes to the lower extremedies; decreased range of motion in the lumbar spine in all ranges to about 40% of normal with focal muscle pain from L-1 to L-5; spur and disc herniation at the L5-S1 level on the left; arachnoiditis manifested by clumping of the nerve roots from L-3 to S-1; S-1 nerve root was displaced laterally because of large disc herniation; low back syndrome, arachnoiditis, sciatica, and recurrent disc herniation at L5-S1 with mid-level lower back problems; and left achilles injury and scoliosis. (Claims file, p. 5).

31. Dr. Morrison stated, in his medical opinion, that Plaintiff's conditions are chronic in nature and have not and will not improve in the future, and will in fact deteriorate further as he ages. (Claims file, p. 5).

32. Dr. Morrison stated, in his medical opinion, that Plaintiff is completely disabled from any substantial gainful activity or employment. He is limited to lifting no more than five pounds, he is required to sit in an orthopedic chair and to apply ice constantly throughout the day for extended periods of time. He is required to sleep 1-3 hours per day as a result of the serious side effects of the medications he is required to take. (Claims file, p. 5).

33. Dr. Morrison encouraged Plaintiff to walk as much as possible to keep his weight down and to try to offset some of the muscle atrophy that is developing. Standing and stop and go walking were limited to 30 minutes, followed by a rest period of at least 45 minutes. (Claims file, p. 5).

34. Dr. Morrison concluded that almost any activity, including personal hygiene and maintenance, are activities that will cause increased pain and discomfort as Mr. Cohen lives on a daily basis, with a moderate degree of pain even at a level of almost no activity at all. (Claims file, p. 5-6).

35. Dr. Morrison gave his medical opinion that even light/sedentary jobs that would require daily attendance would not

permit icing to the degree required and resting to the degree required. Dr. Morrison further stated that all jobs require a level of concentration which Plaintiff is not able to maintain due to his condition. Dr. Morrison stated that the driving requirements of just getting back and forth to work on a daily basis would cause extreme pain and any regular lifting, bending or sitting would do the same. (Claims file, p. 6).

36. Dr. Morrison further opined that sitting at a desk with two minute breaks, as suggested by William Bryant in the FCE, would be wholly insufficient to alleviate the increased pain it would cause. (Claims file, p. 6).

37. Dr. Morrison advised Plaintiff that lifting should be avoided unless absolutely neccessary, i.e., caring for his toddler. (Claims file, p. 5).

38. Dr. Morrison concluded that any doctor who followed Plaintiff for any period of time would definitely advise against the physical activities as suggested in the October 20, 1998 claim rejection letter by Defendant. (Claims file, p. 6).

39. Dr. Randall Smith, who also examined the Plaintiff, stated by letter dated November 16, 1998 his medical opinion that Plaintiff was completely disabled and incapable of returning to any type of work, as a result of the side effects of medications, excessive required periods of resting and icing, and the physical pain experienced by Plaintiff. (Claims file, p. 8).

40. Plaintiff's physicians indicated that Plaintiff was taking the following prescribed medications: Toprol, 50 mg two times per day; Duragesic patch, 75 mgs and Ansaid, 100 mgs. (Claims file, p. 4).

41. Plaintiff's physicians described the side effects of his medications to be drowsiness, nausea, urinary difficulty, dizziness and concentration difficulties which may effect driving and working. (Claims file, p. 4, 7).

II. CONCLUSIONS OF LAW

1. When federal courts review whether an Administrator wrongfully denied disability benefits to a claimant, and the disability plan grants the Administrator or fiduciary discretionary authority to determine eligibility benefits, or to construe terms of the plan, that review is limited as federal courts may only decide whether the denial was arbitrary or capricious. See Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).

2. "Under the arbitrary and capricious (or abuse of discretion) standard of review, the district court may overturn a decision of a Plan Administrator only if it is 'without reason, unsupported by substantial evidence or erroneous as a matter of law.'" Abnathya v. Hoffmann-La Roche, Inc., 2 F.3d 40, 45 (3rd Cir.1993) (quoting Adamo v. Anchor Hocking Corp., 720 F.Supp. 491, 500 (W.D.Pa. 1989)).

3. However, when an Administrator or fiduciary operates the plan with a conflict of interest, courts must weigh the conflict as a factor in determining whether there was an abuse of discretion. See Firestone, 489 U.S. at 115.

4. Accordingly, in Pinto v. Reliance Standard Life Ins. Co., the Third Circuit held that when an insurance company funds and administers a plan, it has a conflict of interest, and courts must apply a heightened form of the arbitrary and capricious standard of review. See Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 387 (3rd Cir. 2000).

5. In Pinto, the Third Circuit adopted a "sliding scale" approach to review under a "heightened" arbitrary and capricious standard, and concluded that the intensity of review should increase in proportion to the intensity of the conflict. See Friess v. Reliance Standard Life Ins. Co., 122 F.Supp. 2d 566, 572 (E.D.Pa. 2000) (citing Pinto, 214 F.3d at 393).

6. When determining the severity of a conflict, courts may consider the following factors: the sophistication of the parties, the information accessible to the parties, the exact financial relationship of the parties, the current status of the fiduciary and the stability of the employing company. See Pinto, 214 F.3d at 392.

7. In the instant case, the Defendant had discretionary authority to determine whether Plaintiff qualified for benefits, and the Defendant both funded and administered the Plan.

8. As the Pinto Court stated, "heightened scrutiny is required when an insurance company is both plan administrator and funder." Pinto, 214 F.3d at 392. When applying the heightened form of the arbitrary and capricious standard, courts should be deferential, but not absolutely deferential, and " '[t]he greater the evidence of conflict on the part of the administrator, the less deferential [the] abuse of discretion standard." See id. at 392.

9. Thus, courts must not only look at the result and whether it is supported by reason, but also at the process by which that result was achieved. See Pinto, 214 F.3d at 392.

10. In the instant case, the Court shall apply the heightened standard of review that is mandated by the Third Circuit.

11. The Defendant's decision to deny Plaintiff continued disability benefits was allegedly based on the results of the Functional Capacity Evaluation (FCE) conducted by William Bryant and Gus Ciardullo, the medical information submitted, a vocational review, and the video surveillance tapes (Claims file, p. 12, 16).

12. Neither William Bryant nor Gus Ciardullo are medical doctors. William Bryant is an Athletic Trainer, and Gus Ciardullo is a Physical Therapist. (Claims file, p. 91). The Claim file does not contain any substantial medical evidence warranting a denial of

disability benefits, in light of the substantial medical evidence offered by Plaintiff.

13. Plaintiff provided medical evidence from several physicians, including Dr. Bruce Morrison and Dr. Randall Smith, both of whom found Plaintiff to be completely disabled and incapable of maintaining any meaningful employment, including those jobs suggested by the Defendant. (Claims file, p. 5-8).

14. The doctors' opinions were based on objective medical tests, including MRI studies and EMG studies. (Claims file, p. 144).

15. According to Mr. Bryant, the FCE revealed the following: 1) Plaintiff could carry up to 21 pounds and lift from the floor 16 pounds; 2) Plaintiff could sit and stand for 30 minutes at a time with a two minute break; 3) Plaintiff could walk for 20 minutes and stand for 30 minutes at a time if there is an opportunity for a 2 minute break. (Claims file, p. 18-19). William Bryant and Gus Ciardullo noted that, if Plaintiff returned to work, he would have significant difficulty due to his self-limiting secondary to pain. They recommended, therefore, that Plaintiff be returned to his physician for final return to work recommendations. (Claims file, p. 109).

16. Plaintiff's physician, Dr. Morrison, strongly disagreed with William Bryant's findings and conclusions. Dr. Morrison opined that sitting at a desk with two minute breaks, as suggested

by William Bryant in the FCE, would be wholly insufficient to alleviate the increased pain it would cause. (Claims file, p. 6). Dr. Morrison concluded that any doctor who followed Plaintiff for any period of time would definitely advise against the physical activities as suggested in the October 20, 1998 claim rejection letter by Defendant. (Claims file, p. 6).

17. Defendant conducted numerous instances of video surveillance on Plaintiff. Video surveillance was conducted on July 5-6, 1997, June 18-20, 1998, July 17, 1998, and July 29, 1998. Surveillance was conducted both at Plaintiff's home residence in Cheltenham, Pennsylvania, as well at his beach house in Margate, New Jersey. (Claims file, p. 60, 70-72, 80-84, 148-153).

18. The record of conversation indicated that Dr. Crouch, and employee of Defendant, told Lisa Glidden, Claims Analyst, that surveillance should be conducted and they "[s]pecifically need footage of him driving/sitting comfortably for more than 30 minutes." (Claims file, p. 98).

19. Over the course of the numerous video surveillance occasions, the following activity by Plaintiff was noted by investigators: walking to a street corner while carrying his infant daughter against his chest, occasionally rocking left to right while standing on the corner watching neighborhood activity; standing in driveway/leaning against his minivan while watering his lawn, then retrieving a lawn chair and sitting in it while

continuing to water his lawn; placing several bags into the rear cargo section of his minivan; walking his dog; lifting his arms above his head to close the rear hatch of his vehicle; entering his vehicle and driving back to his residence in Cheltenham, Pennsylvania; getting off of a bicycle and removing an item from it; sitting on a lawn chair in the driveway and on his enclosed porch; pushing a stroller with his daughter in it and heading toward the boardwalk; eating with his family at a local restaurant; sitting in a lawn chair for a short period, and then walking his daughter in a stroller for approximately one-half mile; sitting on a step and waiting with his son for a school bus, and then walking back into his residence placing his right hand, then his left hand, on his back. (Claims file, pp. 60, 70-72, 80-84, 148-153).

20. None of the activities captured by investigators are inconsistent with the diagnosis of restrictions and limitations by Dr. Morrison, nor do any of these activities indicate that Plaintiff is not "disabled" as defined in the Disability Income Policy issued to ABP. (See Policy No. 50-274598, sec. 2, marked as "Exhibit E.").

21. Therefore, upon consideration of all of the testimony and exhibits offered at the April 15, 2002 Hearing, the Court concludes that the Defendant's decision to deny Plaintiff Long-Term Disability benefits, as stated in their letter to Plaintiff dated

October 20, 1998, was without reason and unsupported by substantial evidence.

22. Accordingly, the Court finds as a matter of fact and law that the Defendant’s denial of Plaintiff’s claim is arbitrary and capricious, and as a consequence, Plaintiff shall be reinstated to receive Long Term Disability benefits, effective October 8, 1998.

This Court’s Final Judgment follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD M. COHEN	:	CIVIL ACTION
	:	
v.	:	
	:	
LIBERTY LIFE ASSURANCE CO.	:	NO. 99-2007

FINAL JUDGMENT

AND NOW, this 27th day of August, 2002, as required by Federal Rule of Civil Procedure 52, IT IS HEREBY ORDERED that this Court enter the attached Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED that **JUDGMENT** is hereby entered in favor of Plaintiff Howard M. Cohen, and that Plaintiff shall be reinstated to receive Long Term Disability benefits, effective October 8, 1998.

BY THE COURT:

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HERBERT J. HUTTON, J.